if and when ILECs act on their purported incentive to engage in a price squeeze, is on its face insufficient to warrant unbundling.

Second, the CLECs' theory ignores history. The Bell companies obtained section 271 relief beginning five years ago. SBC has had relief in the entire Southwestern Bell region (comprising Texas, Missouri, Oklahoma, Kansas, and Arkansas) for just shy of three years (and relief in all 13 states for more than a year). If, as the CLECs claim, long-distance relief under section 271 leads ineluctably to a special access price squeeze, presumably they would be able to identify *some* evidence, in the *five years* since Bell companies began receiving such relief, to support that assertion. The fact that they cannot is dispositive of their claim.

The CLECs' price-squeeze theory is also refuted by the historical fact that Bell companies have for decades been providing wireless service, yet they have not managed to utilize their so-called control over the special access market to force out competitors. AT&T (at 125-27) seeks to distinguish wireless primarily on the unsupported theory that special access constitutes a smaller share of wireless costs than it does of the costs of providing landline service to the enterprise market, such that ILECs have less of an ability to squeeze unaffiliated wireless carriers. But that is not the way the wireless carriers themselves see it. In the D.C. Circuit, the wireless carriers sought to defend the Commission's decision affording them access to UNEs on the same theory that the CLECs rely on here – *i.e.*, that forcing them to rely on special access would permit ILECs to "alter their tariffs and thereby engage in a vertical price squeeze."[170]

[170] Brief of Wireless Intervenors on Behalf of Respondent at 9, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004); *see id.* at 9 n.10 (stressing that this matter is "of particular concern for wireless carriers that are not affiliated with an ILEC" and that, as a result, have to "compete with ILECs that control the pricing of critical inputs").

And, as we have seen, the D.C. Circuit rejected that theory and held that the Commission could not require unbundling for wireless service.[171]

Third, and in all events, the CLECs' claim ignores the mechanisms the Commission has in place for identifying and redressing anticompetitive pricing behavior if and when it should occur. The Loop & Transport Coalition makes this point explicitly, describing the key "question" before the Commission as "whether the regulations applicable to special access are adequate to limit the ILECs' ability to act on their incentive to discriminate against competitors."[172] If that is the question, however, it must be answered *directly*. As SBC explained in detail in its opening comments,[173] and as Chairman Powell has long recognized, if there is a direct solution to a particular problem that does not involve the enormous social costs of unbundling, the Commission must pursue *that* solution, rather than impose on consumers and the economy the costs of unbundling. Indeed, as the D.C. Circuit has explained, any other approach would be "irrational" and inconsistent the court's "admonition in *USTA I* that the Commission must balance the costs and benefits of unbundling."[174]

In this context, that unambiguous command requires the Commission *not* to force widespread unbundling as a prophylactic measure against speculative concerns regarding a price squeeze, but rather to monitor the industry and take action if and when it becomes necessary, either pursuant to the section 208 complaint process or via the Commission's general rulemaking

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[171] *See USTA II*, 359 F.3d at 575-77; *see also* SBC at 22-24 (explaining that, under *USTA II*, Commission cannot require unbundling for wireless). In light of *USTA II*, the Commission cannot order unbundling for wireless services *at all*, much less can it order such unbundling even beyond what was put in place in the *Triennial Review Order*, as Sprint and T-Mobile would have the Commission do. *See* Sprint at 53-56; T-Mobile at 14-22.

[172] Loop & Transport Coalition at 51.

[173] *See* SBC at 34-36.

[174] *USTA II*, 359 F.3d at 570.

authority. AT&T objects to this course on the ground that it is too complex a task for the Commission to undertake,[175] but the Commission itself has already, and repeatedly, made clear that it is capable of guarding against a special access price squeeze and taking action where necessary.[176] And, to AT&T's concern that CLECs purportedly "lack the resources to pursue" price squeeze allegations at the Commission,[177] one need only look at the volume of paper the CLECs have filed in this very proceeding – AT&T alone filed more than 200 pages of comments (prepared by 13 lawyers), along with eight declarations totaling several hundred pages more – to realize the absurdity of this claim.[178]

4. The CLECs' "Bubble" Theory Is Belied by the Facts

Recognizing that their broad claims of impairment are incompatible with the extensive evidence of competitive fiber deployment, the CLECs contend that this evidence says nothing about whether CLECs can compete without UNE access to ILEC facilities. To support this counterintuitive proposition, they invoke the Int3ernet "bubble," which, they claim, made it

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[175] AT&T at 115.

[176] *See LEC Classification Order* ¶ 126 (noting that any concerns about a price squeeze could be addressed directly by regulating the prices for special access itself); *see also id.* ¶ 128 (observing that, in the unlikely event that predatory pricing behavior were to occur, it would be easily detected and, as a result, "it could be adequately addressed" through the Commission's complaint process); *Pricing Flexibility Order* ¶ 131 ("Intermedia's concerns about . . . a potential price squeeze are best addressed in the context of a complaint filed under section 208 of the Act alleging that a rate charged pursuant to a contract tariff or volume or term discount is unreasonably low and thus violates section 201.").

[177] *See* AT&T at 120.

[178] The Commission's ability to monitor Bell companies' provision of special access also provides a complete answer to AT&T's claim that, because UNEs are typically governed by performance measures, special access is an inadequate substitute. *See id.* at 88, 110; *see also id.* at 109 (referring to this distinction as "demonstrat[ing]" that ILECs have the "ability to lower special access quality"); Sprint at 37. The Commission has indicated that, if special access performance measures are necessary, it will put them in place. *See* Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 (2001).

relatively easy to attract communications-related investment in the late 1990s. The result of this, the theory goes, is that, during the bubble, it was much easier to attract financing to deploy competitive fiber. And, now that the era is over, competitors can no longer be expected to attract the necessary financing to deploy their own facilities, thus foreclosing the Commission from drawing inferences from the facilities that are already in the ground.[179]

This argument fails for multiple reasons. First, it fails to account for the fiber that is in the ground already. Inferences aside, there can be no legitimate claim that, where competitive carriers *already* have deployed fiber, competition is impaired. And it is equally beyond dispute that the volume of facilities that has already been deployed – and thus the markets in which CLECs are not impaired – is enormous. Again, for example, the top 50 MSAs boast an average of 19 competitive fiber networks. Regardless of whether those networks were deployed during a "bubble," the *existing* facilities that are in the ground today thoroughly debunk the suggestion that CLECs are impaired everywhere.

Second, and in any event, the CLECs' "bubble" theory is contrary to fact. The CLECs' theory rests on the supposition that competitive carriers did not start putting facilities in the ground *until* the late 1990s, when financing was relatively easy to obtain, and that they stopped as soon as the bubble burst in March 2000. The fact is, however, that competitive carriers began deploying high-capacity facilities well before that time period (and, indeed, well before the 1996 Act).[180] That is why, as noted above, the Commission has described special access as a "mature source of competition in telecommunications markets."[181] The CLECs themselves emphasize

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[179] *See, e.g.*, AT&T at 18; MCI at 41-42.

[180] *See* Fact Report at III-3.

[181] *Supplemental Order Clarification* ¶ 18.

this very point, stressing that much of the competitive deployment on which the ILECs rely in this proceeding "already existed" even before the 1996 Act (and thus well before the Internet "bubble" the CLECs identify as the source for this deployment).[182]

Equally important, competitors have *continued* to deploy fiber even after the bubble burst. At the time of the *UNE Remand Order* – just prior to the bursting of the Internet "bubble" – competitive carriers had deployed 100,000 route miles of fiber.[183] Today, that number has grown to more than 324,000.[184] In 2002 – fully two years after the bubble burst – AT&T's Chairman and CEO told investors that AT&T was continuing to aggressively deploy new fiber, explaining that it had already "built 18,000 route miles of fiber in 90 cities and . . . [has] about 7,000 buildings on net, and that these numbers were "growing every day."[185] And AT&T has made clear that it is continuing this aggressive pace today, stressing that it is "continu[ing] to [put locations] on net, last quarter for instance we did 4300 T-1 rolls and added 79 more buildings and approximately 30 more highly reliable UV rings for our corporate customers."[186] Nor, finally, is this rapid pace of deployment limited to AT&T, or even to the densely populated demand centers that make up most of the enterprise business opportunities. Smaller CLECs also continue to deploy significant amounts of new fiber, not only in the largest markets, but also in numerous lower tier markets.[187] The CLECs' suggestion that the bursting of the Internet bubble

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[182] Loop & Transport Coalition at 4.

[183] *See* Fact Report at I-2, Table 1.

[184] *See id.*

[185] David Dorman, President, AT&T, Remarks at the Goldman Sachs Communacopia Conference, New York, N.Y. (Oct. 2, 2002).

[186] Q2 2004 AT&T Earnings Conference Call – Final, FD (Fair Disclosure) Wire, Transcript 072204aj.776, at 9 (July 22, 2004).

[187] *See* Fact Report at III-3-5 & Table 2.

rendered them unable to deploy high-capacity facilities is thus inconsistent with the CLECs' own words and deeds. It should be rejected out-of-hand.

C. The Commission Should Revise Its EELs Safeguards To Meaningfully Channel the Use of UNEs Toward Local Service

The CLECs concede, as they must, that the D.C. Circuit's *USTA II* decision invited the Commission to correct its admittedly "imperfect" criteria for channeling CLECs' use of EELs toward local service.[188] In their view, however, the appropriate "correction" would be to eliminate those criteria altogether, leaving the CLECs with unlimited rights to obtain UNE access to special access facilities for the provision of enterprise services, even if they are only providing long-distance service over those facilities. As they see it, *USTA II* "devastated the legal basis upon which the Commission justified its use restrictions," and the Commission has little choice but to remove them.[189]

This argument flies in the face of the D.C. Circuit's *USTA II* decision. As SBC explained in its opening comments, far from "devastat[ing]" the Commission's authority to impose restrictions on the use of EELs, the D.C. Circuit in fact anticipated that the Commission would continue to impose such restrictions, to the extent the Commission authorized unbundling of high-capacity facilities at all. The court specifically stated that its decision on qualifying/non-qualifying services "does *not* . . . necessarily invalidate the Commission's effort to prevent the use of EELs for long distance service."[190] Rather, the court stressed that AT&T and its supporters "ha[d] pointed to no evidence suggesting that they are impaired with respect to the provision of [such] services," nor did they "deny that they have been able to purchase use of

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[188] *See, e.g.*, AT&T at 142-45.

[189] *Id.* at 135; *see* MCI at 172-74.

[190] *USTA II*, 359 F.3d at 592 (emphasis added).

EELs as 'special access.'"[191] Indeed, the court quite correctly cast serious doubt on whether competitors could *ever* be considered impaired in *any* respect without access to EELs, stressing that "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic."[192] Here, as discussed above, there is robust competition not only for special access services, but also, and equally important, for the enterprise customers that are predominantly served via special access in lieu of EELs today. This competition in the enterprise market – which the Commission has all but ignored in its earlier EELs analysis – can no longer be ignored. The D.C. Circuit has emphasized that, where carriers have competed successfully using special access services purchased from the ILECs, the Act "*precludes*" a finding that they would be impaired if they could not "convert" those circuits to UNEs.[193] And the court further emphasized that "if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward."[194] Thus, the court made clear that it anticipated that the Commission would, on remand, "turn to the issue of impairment," and fully expected that the Commission "may well find none," for, at a minimum, long distance.[195] And, in light of all of

[191] *Id.*

[192] *Id.*

[193] *Id.* at 591, 593 (emphasis added).

[194] *Id.* at 593.

[195] *Id.* at 592.

this, the court specifically and intentionally left in place the eligibility requirements that AT&T would now have the Commission remove.[196]

Moreover, just as AT&T and its supporters "pointed to no evidence suggesting that they are impaired with respect to the provision" of long-distance services in the D.C. Circuit, so too do they fail to identify any evidence that they are impaired in the provision of *any* services to enterprise customers, much less long-distance service. Indeed, the only argument the CLECs offer to the contrary is their claim that reliance on special access will lead to a price squeeze.[197] But, for the reasons explained above, that claim is theoretically implausible and factually without support, and it is accordingly no basis on which the Commission could ground a finding of impairment without access to EELs.

As SBC has explained above, it is the incumbent long distance companies, not the ILECs, that largely control the retail market for enterprise services. They have the largest market share, the only ubiquitous national networks, longstanding customer relationships, the most experienced enterprise customer sales force, and long-term contracts that lock-in many of their customers for years to come. To permit these companies expanded access to UNEs – in other words, to give them a massive price break on services that they are *already* using to serve the overwhelming majority of this segment – would do nothing more than cement their hold on the market. Such a drastic step would do far more to distort and diminish competition than it would to enhance it, and there is no legal basis upon which the Commission could justify such anomalous public policy.

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[196] *See id.* at 592-93, 594.

[197] *See, e.g.*, AT&T at 140.

Instead of eliminating the *Triennial Review Order*'s eligibility criteria as the CLECs would have the Commission do, therefore, the Commission should eliminate EELs, which are unnecessary to competition in the enterprise market. If the Commission does not take that logical step, at a bare minimum, the Commission must at least strengthen the eligibility criteria so that they meaningfully channel CLECs' use of EELs toward local service. As SBC has explained, to accomplish this result, the Commission need only take two limited steps: First, the Commission should adjust the EEL-to-interconnection trunk ratio from to 24 DS1 EELs (or the equivalent) per trunk to five DS1 EELs (or the equivalent) per trunk. As the Commission itself has already suggested,[198] an increase in the ratio along these lines is necessary to ensure that the facility in question is used in substantial measure to provide local service. Second, the Commission should require the CLEC to certify (and allow the ILEC to verify) that the traffic traversing the associated interconnection trunk in each arrangement is in fact local voice service – rather than, say, Internet access or other data traffic, or long-distance traffic that is being passed off as local traffic as part of an access avoidance scheme. Otherwise, there will be no guarantee that the EEL traffic destined for the required trunks is in fact local voice service for which a finding of impairment has been made.

Finally, the Commission must reject the CLECs' claim that the Commission should "permit competitive carriers immediately to 'convert' special access circuits to . . . UNEs."[199] For the reasons explained in our opening comments, such a decision would be directly contrary to *USTA II*. As the court there recognized, a conversion can occur only if the requesting carrier already is using special access services to provide the services that it seeks to offer. But, if a

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[198] *See Triennial Review Order* ¶ 608.

[199] AT&T at 141.

carrier already is using special access services to provide the services that it seeks to offer, it could not possibly be said that it requires UNEs in order to offer those services. "Where competitors have access to necessary inputs at rates that allow competition to flourish," the court explained, "it is hard to see any need for the Commission to impose the costs of mandatory unbundling."[200] "Moreover," the court continued, "where (as here) market evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition, and where (as here) there is no claim that ILECs would be able drastically to hike those rates," any concerns about the prospect of raising tariffed prices "recede . . . in the background."[201] Thus, specifically with respect to conversions – on which the court expressly credited the ILECs' "independent attack" – the court explained that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . *precludes* a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)."[202]

II. COMPETITION IS NOT IMPAIRED WITHOUT ACCESS TO SWITCHING

SBC's comments demonstrated that competitors, both intramodal and intermodal, can and do compete in markets around the country without unbundled switching and thus the UNE-P. Traditional wireline CLECs are currently using their own switches to serve at least 3 million *mass-market* customers (that is, residences and small businesses), and those customers

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[200] *USTA II*, 359 F.3d at 576.

[201] *Id.*; *see also id.* at 593 (crediting ILECs' "independent attack" on conversions and incorporating earlier discussion of special access in connection with wireless services).

[202] *Id.* at 593 (emphasis added); *see also id.* ("if history showed that lack of access to EELs had not impaired CLECs in the past" – *i.e.*, because they were able to use special access instead – "that would be evidence that similarly situated firms would be equally unimpaired going forward").

are located throughout the country. CLEC switches are being used in 137 of the top 150 MSAs, which cover 70% of the country's population[203] These switches, moreover, are being used in wire centers that cover *85%* of the population in the top 150 MSAs.[204]

At least as important, cable, VoIP, and wireless competitors are providing real and rapidly expanding intermodal alternatives to ILEC local service across the country. Cable providers have achieved voice service penetration rates of as high as 45% to 55%, and are on track to make IP-based telephony available to at least 80% of households by the end of 2005.[205] Comcast will offer IP telephony to 95% of its 40 million homes by that time.[206] Already, cable IP-based voice services are attracting consumers rapidly, with 40% of Time Warner's customers in Portland subscribing to its IP-based service, and Cablevision adding 3,400 IP telephony customers *each week* in New York alone.[207] In addition, both traditional competitors such as AT&T, data providers such as Covad, and upstarts such as Vonage, VoicePlus, and Packet8 are already offering VoIP service broadly across the nation, and can provide that service at attractive rates to the 90% of consumers with access to a broadband connection.[208] What is more, many consumers use wireless as a substitute for wireline voice service. About 2.7 million wireless subscribers give up their wireline phone every year; at least 14% of consumers use their wireless phone as their primary phone; and wireless is expected to displace 22 million wireline access

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[203] *See* Fact Report at II-42.

[204] *See id.*

[205] *See id.* at II-7, II-39.

[206] *See id.* at II-7.

[207] *See id.* at II-8.

[208] *See id.* at I-2, Table 1.

lines in the next four years.[209] Consumers also use other modes of communication, such as email and instant messaging, in lieu of local telephone service.

The evidence on these points is so compelling that even the traditional champions of UNE-P have given up the ghost. Most importantly, AT&T, which argued in 2002 that the only alternative to synthetic UNE-P "competition" was "NO COMPETITION AT ALL,"[210] now states in the very first sentence of its comments that it "no longer seeks permanent rules that require the unbundling of mass market switching and the maintenance of the UNE-P."[211] Indeed, in notable contrast to its previous position that the UNE-P would encourage facilities-based entry, AT&T now pointedly distinguishes UNE-P access from other obligations that it claims (incorrectly) would "foster *facilities-based* competition."[212] Thus, in accord with its business decision to rely upon broad-based marketing of its VoIP "CallVantage" service to mass-market consumers, even AT&T no longer claims that perpetuating access to the UNE-P is consistent with either the 1996 Act's specific impairment requirements or the statute's overriding intent of encouraging facilities-based entry.

Subsidized, risk-free entry is hard to give up, however, and a few commenters (most notably, MCI) still urge the Commission to require switch unbundling, and thus the UNE-P, for mass-market consumers. In support of that position, they cling to the same discredited arguments that they have made in prior proceedings, and which have led to this Commission's

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[209] *See id.* at II-28-30 & Fig. 4.

[210] Reply Comments of AT&T Corp. at iii, CC Docket Nos. 01-338 *et al.* (FCC filed July 17, 2002) (emphasis omitted).

[211] AT&T at i.

[212] *Id.*

orders being vacated on three separate occasions. These arguments are uniformly inconsistent with the record and with binding judicial precedent, and they should be rejected once and for all.

A. Intramodal Competition Establishes That Competition Is Not Impaired Without Unbundled Access to ILEC Mass-Market Switching

As SBC demonstrated in detail in its opening comments, the relevant legal question here is whether an efficient competitor can compete in a particular class of markets without UNE access to a facility (here, switching). In the D.C. Circuit's words, the question is whether the facility is "suitable" for competitive supply in those markets.[213] As reiterated in *USTA II*, the relevant issue is whether competition is "possible" in the absence of unbundled access to a facility.[214]

Of course, if the record evidence shows that a competitor *is* competing without using unbundled switching in a particular market, that fact necessarily establishes that an efficient competitor *can* compete both in that market and in other markets with similar characteristics.[215] Accordingly, the documented record evidence showing that wireline CLECs are competing using their own switches in 137 of the top 150 MSAs, and are serving wire centers accounting for 85% of the population in those MSAs, establishes *conclusively* that CLECs can compete across the country without unbundled switching. For that reason alone, the Commission cannot lawfully require UNE access to switching for mass-market customers.[216]

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[213] *USTA I*, 290 F.3d at 427.

[214] *USTA II*, 359 F.3d at 424.

[215] *See* SBC at 28-30.

[216] This evidence also undermines the claim of parties such as ACN (at 3-8) that claim that they have not found it profitable to pursue an alternative, facilities-based strategy. The evidence shows that other intermodal and intramodal competitors can and do compete with their own facilities. That evidence necessarily demonstrates that an efficient competitor can compete. Thus, as a matter of law, there can be no impairment.

The CLECs that seek to perpetuate synthetic UNE-P competition never come to grips with this controlling point. Instead, they try to show that individual markets (as they incorrectly define them) examined in isolation are not already *fully* competitive without UNE access. Thus, MCI seeks to perpetuate the UNE-P by employing a test that looks to whether there are at least *three* alternative providers in *each individual wire center*.[217] Under binding precedent, this form of analysis is unlawful for multiple reasons.

First, as discussed above, the D.C. Circuit has made abundantly clear that the relevant question is whether competition is "possible" – *i.e.*, whether a facility is "suitable" for competitive supply. MCI does not explain, nor could it, why a test based on the existence of *three* facilities-based alternatives is appropriate to demonstrate whether competition is *possible*. In fact, as SBC has explained, in most circumstances, the existence of a single carrier providing service without UNE access to switching demonstrates that an efficient carrier would not be impaired without UNE access and thus necessarily mandates the conclusion.

Nor could claims that the existence of three facilities-based entrants is necessary to demonstrate that competition is *possible* be squared with the Commission's conclusion that cable companies face "*effective* competition" for purposes of 47 U.S.C. § 543 and 47 C.F.R. § 76.905 (and thus are not subject to rate regulation) so long as there is a single LEC offering video service in a franchise area.[218] If the Commission adopted the rule advocated by MCI, the existence of video competition from a single ILEC would free a cable company from regulation,

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[217] *See* MCI at 82-86, 116-20.

[218] *See, e.g.*, Memorandum Opinion and Order, *MCC Iowa LLC*, 2004 WL 2173456, ¶ 3 (Media Bur. rel. Sept. 28, 2004) ("a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming service directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area . . ., provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator").

but the existence of equivalent voice competition from a cable company would still leave the ILECs subject to onerous regulatory obligations. The Commission should reject that illogical and anti-competitive result.

Indeed, it would be particularly perverse to require more than one facilities-based carrier (or the existence of substantial market share for facilities-based wireline carriers[219]) in a context in which the Commission has created enormous incentives for CLECs to compete through the subsidized resale of the UNE-P *instead* of deploying their own facilities. As the Commission itself previously noted, unbundling can make it "difficult for facilities-based competitors to compete against entrants relying on TELRIC-priced UNEs," because "it would be difficult for an entrant . . . to achieve costs as low as the TELRIC price."[220] The federal courts have similarly emphasized that UNE-P access at rock bottom rates has preempted an enormous amount of facilities-based competition: "Prices for unbundled elements affect . . . new investment and innovation: if the price to rivals is too low, they won't build their own plant (why make capital investments when you can buy for less, one unbundled element at a time?)."[221] Indeed, AT&T's recent actions powerfully demonstrate that, even where facilities-based competition is possible, entrants will make the investments (and thus take the risks) necessary to compete using alternative facilities only when it becomes apparent that they will not have long-term access to the guaranteed profit margins created by the UNE-P.

For similar reasons, the Commission cannot and should not adopt carrier-specific thresholds for eliminating unbundling (such as the suggestion by PACE and CompTel/ASCENT

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[219] *See* PACE at 42-43.

[220] *Triennial Review Order* ¶ 112 & n.379.

[221] *AT&T Communications of Illinois, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 404 (7th Cir. 2003) (Easterbrook, J.); *see USTA I*, 290 F.3d at 424 & n.2.

that the Commission allow unbundling for each carrier until it serves 1500 customers per wire center[222]). The evidence shows that efficient competitors can and do compete today without UNE access to switching. That evidence requires a finding of no impairment, and there is no lawful basis for the Commission to establish a different rule to benefit individual carriers that claim they cannot use their own switches to serve customers in a wire center until they have signed up 1,500 customers in that wire center. Moreover, like the CLECs' proposed test for high-capacity facilities, this test impermissibly gauges the needs or desires of individual CLECs instead of whether competition is possible without UNE access. Thus, under this test, a CLEC would be able to use the UNE-P to serve customers in a wire center, even in the face of fierce facilities-based competition in the market in which that wire center resides.

Second, and independently, MCI's analysis looks at each market (as it defines it) in atomistic isolation without drawing any inferences from evidence of deployment in analogous markets. MCI asserts that the Commission should look at whether, *in each specific market*, competitors have four facilities-based choices (three intramodal options plus the ILEC) to determine whether unbundling should be required in that specific market.[223] While there was, to say the least, substantial doubt about the legality of this sort of blinkered approach when the Commission adopted it in the *Triennial Review Order* as the first part of a two-pronged test, in the wake of *USTA II*, there can be no longer be any serious debate that MCI's analysis is an invitation to reversal. As discussed above and in our opening comments, in *USTA II*, the D.C. Circuit found that the Commission acted arbitrarily and contrary to the statute in attempting to adopt just this kind of approach to determining impairment on transport routes – refusing to draw

[222] *See* PACE at III; CompTel/ASCENT at 45; *see also* ALTS *et al.* at 97-98.

[223] *See, e.g.*, MCI at 31.

any inference that deployment on one route meant that CLECs could reasonably deploy facilities on analogous routes. The court stated quite clearly that the Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment."[224]

The same reasoning applies here. If an efficient competitor has deployed facilities in a market with particular characteristics (or, as is the case with mass-market switching, almost *all* markets nationwide), that means that it is possible to rely upon alternative facilities across all the relevant class of markets, regardless of whether competitors have actually deployed facilities in a particular geographic area. The Commission could thus adopt MCI's submission only by defying the D.C. Circuit's decision and repeating the same error that the court identified in *USTA II*. For that reason as well, this argument must be rejected.

Third, and independent of these other errors, MCI's analysis (as well as that of some other CLEC commenters) is based on the absurd proposition that each individual wire center is its own market.[225] That assertion is erroneous for multiple reasons. As an initial matter, MCI does not provide any empirical evidence that CLECs generally enter only in individual wire centers and not in broader geographic areas. And even if a few carriers did pursue such a strategy, that would not be what an efficient entrant does, which is the relevant question here. That is because a CLEC that sought to serve a single wire center would experience huge diseconomies of scale not only with respect to the cost of the switch, but with respect to nearly all other costs of providing service, including billing and customer care costs, internal and external OSS costs, and regulatory-related costs.

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[224] *USTA II*, 359 F.3d at 575.

[225] *See* MCI at 35; *see also* Dialog at 5; ACN at 4.

Indeed, CLECs, including MCI, have long emphasized that they deploy switches more efficiently than ILECs precisely because they use them to cover a geographic area broader than a single wire center. For instance, MCI has previously stated that it "uses state-of-the-art equipment and design principles based on technology available today . . . which makes it possible to access and *serve a large geographic area from a single switch.*"[226] Thus, MCI explained that it "uses 4 local switches and a transport network to serve [26] rate centers" that the incumbent serves with "5 local tandems and a multitude of end offices."[227]

Additionally, the discovery responses provided to SBC by facilities-based CLECs in the state proceedings belie any assertion that the wire center is a meaningful geographic criterion for them. A number of CLECs had difficulty even providing data by wire center, asserting that they do not track information on that basis.[228] If facilities-based carriers truly viewed individual wire centers as geographic markets, it defies all reason to think they would not track or maintain data at that level.

Beyond this, MCI's assertion that relevant factors may vary widely from one wire center to another misses the point. Whether CLECs can profitably serve individual wire centers within a larger metropolitan area is not the question. SBC does not make a profit on every wire center, and it sees no reason why it should be the Commission's policy to ensure that CLECs do. The question is whether an efficient intermodal or intramodal competitor can compete without UNE

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[226] *See* UNE Fact Report 2002 at II-8, Table 7 (Apr. 2002) (Attach. A to Comments of SBC Communications Inc., CC Docket Nos. 01-338 *et al.* (FCC filed Apr. 5, 2002)) (emphasis added).

[227] *Id.*

[228] *See, e.g.*, Rebuttal Testimony of Terry L. Murray on Behalf of MCI, Attach. TLM-23 (AT&T Resp. to Bench Requests 3 & 4; KMC Resp. to SBC RFI No. 1-3), Docket No. 28607 (Tex. PUC filed Mar. 19, 2004).

access across the market as a whole. From the evidence establishing that competitors, including cable companies, VoIP providers, and wireline entrants, are doing so today, we know that the answer to that question is yes. Accordingly, consumers are getting the benefit of competition in these wire centers today.

Finally, it is important to note in this regard that this Commission has repeatedly looked to geographic areas much larger than a wire center in determining related competitive issues. For instance, in its assessment of how the merger of formerly independent incumbent LECs would affect local exchange competition in the merged territories, the Commission identified specific metropolitan areas as the geographic markets subject to a competitive assessment.[229] Further, in its order granting ILECs pricing flexibility for certain interstate services, the Commission concluded:

> We will grant pricing flexibility relief for both Phase I and Phase II on an MSA basis. We agree with those commenters that maintain that MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition.[230]

The Commission held that MSAs are defined "narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable."[231] Accordingly, MCI's reliance on a wire center approach is inconsistent with both established facts regarding competitive entry and this Commission's own analysis. For that reason as well, it should be rejected.

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[229] *See* Memorandum Opinion and Order, *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent To Transfer Control*, 12 FCC Rcd 19985, ¶ 43 (1997).

[230] *Pricing Flexibility Order* ¶ 72.

[231] *Id.* ¶ 71.

B. Intermodal Competition Confirms That Competition Is Not Impaired Without Unbundled Access to ILEC Mass-Market Switching

Consumers across the country have a wealth of options for communicating. They can, and increasingly do, obtain voice service from a cable company, from any of a number of VoIP providers, or through a wireless carrier. They also send millions and millions of communications via email and instant messaging. In Chairman Powell's words, "[t]oday's communications market offers Americans unprecedented choices, and the number of innovative communications platforms continues to expand at a remarkable rate."[232]

MCI and other "UNE-P forever" commenters, however, want the Commission to act as if this thriving competition simply doesn't exist. According to them, the millions and millions of voice customers that cable, VoIP, and wireless companies have *already* gained at the expense of ILECs (with many more millions on the way) and the billions of dollars they have expended to provide real facilities-based competition are somehow beside the point. To MCI, they "cannot form the basis for a finding of non-impairment."[233] Such contentions defy both common sense and binding precedent. They should be rejected.

As an initial matter, this Commission cannot close its eyes to the overwhelming evidence of extensive intermodal competition on the ground that, as PACE argues, Congress allegedly did not "intend to accomplish a competitive market exclusively through intermodal competition, but intended to foster wireline-based local competition."[234] In fact, the purpose of the 1996 Act is

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[232] Michael K. Powell, Chairman, Federal Communications Commission, Remarks Before the NSTAC XXVII Executive Session Luncheon, U.S. Chamber of Commerce, Washington, D.C., at 2 (May 19, 2004).

[233] MCI at 86; *see also* Momentum at 11 ("None of the so called 'intermodal' competitors – cable, wireless, or VoIP – are viable substitutes for analog residential POTS service.").

[234] PACE at 63.

not to prop up specific companies that choose to rely upon a particular technology, but rather to enhance the welfare of *consumers* by bringing them the benefits of competition. In the D.C. Circuit's words, "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition."[235] Accordingly, when this Commission required unbundling of the high-frequency portion of the loop without considering the intermodal alternatives, the D.C. Circuit concluded that its actions were "quite unreasonable" and were taken with "naked disregard of the competitive context."[236] Indeed, the D.C. Circuit has explained, the existence of intermodal competition by itself justifies a decision to decline to require unbundling, *regardless* of whether particular wireline competitors can compete without UNE access. The presence of such competition is sufficient, the court explained, because it "means that even if all CLECs were driven from the . . . market, mass market consumers will still have the benefits of competition between cable providers and ILECs."[237]

Nor, contrary to the arguments of MCI and some others, is there any context-specific reason to discount the overwhelming evidence of exploding intermodal competition in the mass market for voice services. MCI makes a passing attempt to discount the significance of cable telephony providers.[238] It first claims that, because they do not use ILECs' loop plant, cable competition "does not provide any evidence about whether it is possible to enter using UNE-

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[235] *USTA II*, 359 F.3d at 576.

[236] *USTA I*, 290 F.3d at 429.

[237] *USTA II*, 359 F.3d at 585.

[238] *See* MCI at 93-94.

L."[239] As discussed above, however, under the statute and the D.C. Circuit's decisions, the question here is whether consumers can get the benefit of facilities-based competition, not whether specific competitors are able to do so using a particular technology. This argument is thus irrelevant and contrary to binding law.

MCI also briefly claims that cable telephony is not "matur[e]" and involves high costs for consumers.[240] The facts do not support those facially dubious assertions. Indeed, consumers have made clear that they view cable telephony as a real and significant choice for voice communication. More than 15% of cable customers generally subscribe to circuit-switched cable telephony where it is available, and the take rates are as high as 45% in Omaha and 55% in Orange County, California.[241]

Moreover, cable is now deploying IP-based telephony services at a blistering pace – a pace that will result in more than 80% of Americans being able to obtain IP-based telephony from a cable provider by 2006[242] – and consumers are again responding. For instance, some 40% of Time Warner customers in Portland are now purchasing that cable company's IP-based telephony service, and Time Warner is signing up 1,200 new customers every day.[243] Likewise, Cablevision is signing up 3,400 new customers every week for its service in the New York area alone.[244] These facts simply cannot be squared with assertions that cable service is not offered at

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[239] *Id.* at 93.

[240] *See id.* at 94.

[241] *See* Fact Report at II-38-39 & n.199.

[242] *See id.* at II-7.

[243] *See id.* at II-8.

[244] *See id.*

a level of "quality" or "cost"[245] that is sufficient to attract consumers. Rather, as the CEO of Comcast recently emphasized, cable companies are engaged in "fierce" competition with the ILECs and that competition is both "real and sustainable."[246]

In the end, MCI tacitly concedes that cable is a significant facilities-based competitor to ILEC voice, but argues that cable competition at most creates a "duopoly" and for that reason allegedly is not sufficient to demonstrate lack of impairment.[247] As an initial matter, there is no support for the conclusion that a single powerful intermodal competitor is insufficient to support a conclusion of lack of impairment. In fact, the D.C. Circuit has repeatedly held that extensive competition from cable providers by itself supported the Commission's decision not to unbundle broadband facilities.[248] And, as discussed above, this Commission has found the existence of a LEC competitor enough to conclude that there is "effective competition" in video services.

In any case, however, the question is a purely hypothetical one because MCI's premise is wrong – cable is not even remotely the only intermodal or intramodal competitor that ILECs face. Competition also comes from a multitude of VoIP and wireless providers (as well as UNE-L providers as discussed above). And MCI fares no better in arguing that the Commission should close its eyes to these competitors than it does with cable providers.

With respect to VoIP, MCI's lead argument is that "VoIP is not a facility but only a service that can ride over a broadband facility."[249] That statement proves nothing. The statute

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[245] MCI at 94, 95.

[246] E. Herman, *Seidenberg, Roberts Pledge More Cooperation on Policy Goals*, Communications Daily, Oct. 13, 2004, at 1, 2 (quoting Brian Roberts).

[247] *See id.* at 95-96.

[248] *See, e.g., USTA II*, 359 F.3d at 582.

[249] MCI at 98 (emphasis omitted).

speaks of impairment in the "services" that competitors seek to offer.[250] The ability of VoIP providers to offer voice *service* without access to UNEs is thus directly relevant to impairment. Indeed, the fact that VoIP providers need not own the underlying broadband transmission facilities means that the number of potential competitors that could use this technology is virtually limitless, which, if anything, strengthens the claim that the voice market is open to multiple providers that do not rely on UNEs.

Similarly, contrary to some parties' arguments,[251] the need for a broadband connection is not an obstacle to use of VoIP for most consumers. More than 90% of American households can now receive a broadband connection from someone other than the ILEC,[252] and this Commission has repeatedly concluded that competition in that market is intense, leading to lower prices and greater functionalities for consumers. As the Commission recently stated, the "competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices."[253] Accordingly, as the Fact Report demonstrates in detail, even for mass-market customers that do not currently receive broadband, the cost of VoIP service is competitive with traditional narrowband voice.[254] And, of course, for the 25% of American households that

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[250] 47 U.S.C. § 251(d)(2).

[251] *See* MCI at 99; PACE at 15.

[252] *See* Fact Report at II-2.

[253] Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, FCC 04-208, at 13 (rel. Sept. 9, 2004) ("*Fourth Report to Congress*").

[254] *See* Fact Report at II-17-20.

already receive broadband service for other purposes, the incremental cost of adding VoIP is even more attractive.[255]

It is thus no surprise that VoIP is growing rapidly. AT&T is already offering a VoIP service to 62% of American households, and projects that it alone will have 1 million VoIP subscribers by the end of next year.[256] Vonage currently offers service in 1,900 wire centers in 120 markets, has at least 275,000 customers, and is adding more than 25,000 lines per month.[257]

The rapid growth of these services also demonstrates that the supposed differences in quality alleged by some commenters[258] do not prevent consumers from using VoIP as a substitute for traditional narrowband voice. Indeed, PACE acknowledges that VoIP providers can and do offer access to 911/E911 service.[259] And although MCI offers a few anecdotes about sound quality and delay,[260] there is in fact near universal agreement among independent analysts, equipment makers, and competitive carriers that VoIP provides comparable quality and functionality to traditional wireline service.[261] In AT&T's words, VoIP "[w]orks like your home phone – only better."[262] Indeed, VoIP providers can and do offer numerous *additional* functionalities not offered by circuit-switched voice service, including such things as a

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[255] *See id.* at II-12-16.

[256] *See id.* at II-9.

[257] *See id.* at II-10-11.

[258] *See* MCI at 101-03; PACE at 16.

[259] *See* PACE at 16.

[260] *See* MCI at 101-02.

[261] *See* Fact Report at II-20-21.

[262] *Id.* at II-21, Table 6.

searchable phone book, forwarding of voicemail to multiple email accounts, and "locate me" functionality.[263]

Finally, and contrary to some commenters' claims,[264] for many consumers, wireless service is in fact a substitute for wireline service. The facts don't lie. Approximately 7-8% of Americans have given up wireline service entirely in favor of wireless, and *2.7 million more are giving up their wireline phones each year.*[265] Moreover, today approximately 14% of consumers use their wireless phone as their primary phone.[266] Indeed, the Commission has required ILECs to allow consumers to port their wireline numbers to wireless phones precisely because consumers want to make wireless phones their primary or exclusive line.[267] By July 2004, more than 500,000 consumers had ported their wireline numbers to wireless phones.[268]

Even beyond that fact, wireless is competing with wireline by displacing a large percentage of wireline traffic. Just between 2003 and 2004, analysts estimate that wireless minutes will increase from 23% to 29% of all minutes, and wireless minutes are rising 36% every year.[269]

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[263] *See id.* at II-27.

[264] *See* MCI at 88-93; PACE at 11-14.

[265] *See* Fact Report at II-28-29.

[266] *See id.* at II-30.

[267] *See* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 18 FCC Rcd 23697, ¶ 22 (2003) ("We conclude that, as of November 24, 2003, LECs must port numbers to wireless carriers."); *id.*, Separate Statement of Chairman Powell ("By firmly endorsing a customer's right to untether themselves from the wireline network – and take their telephone number with them – we act to eliminate impediments to competition between wireless and wireline services.").

[268] *See* Fact Report at II-30.

[269] *See id.*

Thus, regardless of opportunistic and dated claims about the quality of wireless service – claims that SBC has already shown to be contrary to more recent information[270] – the facts show that millions of consumers believe that the price of wireless service, combined with its other attractive features (including, obviously, mobility) make it an attractive substitute for ILEC wireline service. Those facts, like the other facts demonstrating that both intermodal and intramodal competitors can compete around the country without UNE access, require that the Commission find no impairment here.[271]

C. CLEC Claims of Barriers to Entry Are Irrelevant and Unsubstantiated

The CLECs also err in recycling their hypothetical and unsubstantiated claims that hot cuts create a barrier to entry in an attempt to establish impairment.[272]

As an initial matter, theoretical concerns about the hot cut process (or any other supposed operational concern) are beside the point given the detailed record evidence that intermodal and intramodal competitors can and do compete around the country without UNE access. The demonstrated existence of such non-UNE-based competition is dispositive here, and there is no need for the Commission to evaluate hypothetical concerns that allegedly prevent the entry that has already occurred. Indeed, as noted above in connection with purported operational issues associated with the deployment of high-capacity loops and transport, this Commission has made

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[270] *See* SBC at 53-54.

[271] Contrary to PACE's argument (at 12), there is no conflict between this position and the one taken by Cingular in the context of its merger with AT&T Wireless. There, Cingular demonstrates that wireline competition by itself is not sufficient to constrain prices in the *wireless* market. Wireline services, after all, do not offer the mobility function that is the hallmark of wireless service. Here, SBC shows something very different: that wireless services can and do substitute for wireline services and that this competition, in combination with many other modes of intermodal and intramodal competition, demonstrates that competition is not impaired without the UNE-P.

[272] *See, e.g.*, MCI at 47-65; Momentum at 10-11.

plain that it "agree[s] . . . that actual marketplace evidence is the most persuasive and useful kind of evidence submitted."[273] Such evidence of actual competition "demonstrates better than any other kind what business decisions actual market participants have made regarding whether it is feasible to provide service without relying on the incumbent LEC" and "shows . . . whether *new entrants*, as a practical matter, have surmounted barriers to entry."[274]

For all the reasons discussed above, there is ample evidence that both intramodal and intermodal competitors are competing for mass-market customers without UNE access to ILEC switching. That evidence shows, in the D.C. Circuit's words, that such competition is "possible" and that these markets are "suitable" for competitive supply. No further analysis is necessary or appropriate here.[275]

Even if the Commission were to review these assertions regarding alleged hot cut difficulties, they provide no basis to conclude that competitors are impaired without UNE access. Of course, hot cuts are not needed by intermodal competitors, and thus these contentions do not have any conceivable relevance to the ability of those competitors – whose extensive entry by itself demonstrates lack of impairment – to provide service.

Even beyond that, there is no reason to believe that SBC cannot continue to perform satisfactory hot cuts, even at higher volumes, just as it was doing even before it adopted the substantial enhancements contained in its batch hot-cut process. SBC has provided the Commission with a sworn affidavit demonstrating in detail that existing hot cut volumes take

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[273] *Triennial Review Order* ¶ 93.

[274] *Id.*

[275] For the same reason, the results of speculative and hypothetical results of MCI's "MiCRA" model are irrelevant. In the face of evidence that intermodal and intramodal competitors are competing everyday, MCI's self-serving (and input-dependent) conclusion that they cannot compete is entitled to no weight.

only 1.3% of central office person-hours and that SBC could handle hot cuts on *all* UNE-P orders with between a 0.9% and 6% increase in overtime.[276] Neither MCI nor any other CLEC has ever provided a tenable explanation why that detailed, fact-based affidavit does not establish that SBC can meet any foreseeable demand.[277]

Perhaps in recognition of the futility of its claim, MCI resurrects an argument the Commission has already rejected. Ignoring its own prior claims that the ability to handle large volumes of hot cuts in batches was the real problem, MCI now claims that the "primary" problem is with the lack of mechanization of ordinary, "garden variety" hot cuts.[278] MCI's change in strategy demonstrates that its alleged concerns about hot cuts are, and have always been, nothing more than an opportunistic ruse intended to perpetuate the UNE-P by any means necessary. In any event, the Commission's 49 separate 271 findings that existing processes were sufficient to provide CLECs a meaningful opportunity to compete (and were scalable to meet increased demand)[279] plainly rebut MCI's arguments about "garden-variety" hot cuts, as does the

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[276] *See* Berringer/Smith Decl., attached to Reply of SBC Communications, Inc., CC Docket Nos. 01-338 *et al.* (FCC filed July 17, 2002); SBC at 46-47.

[277] MCI cites a *proposed* decision from an ALJ in California, *see* Draft Proposed Decision of the ALJ, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Rulemaking 95-04-043 (Cal. PUC July 28, 2004), but even the relevant part of that decision only questioned SBC's ability to do more than 100,000 hot cuts per month in California without adding to its current workforce, *see id.* at 28-29, which would obviously be an option that SBC could pursue if hot cuts ever reached such a volume. Moreover, SBC has demonstrated that its sophisticated force models allow it to hire and train new technicians in time to meet any such increase in demand. *See* Joint Direct Testimony of R. McDonald, S. Robinson, K. King, and T. Lanoux, at 61-63, *Proceeding to Determine Mass Market Hot Cut Process for State Implementation of Federal Communication Commission's Triennial Review Order*, Docket No. 29175 (Tex. PUC filed Mar. 5, 2004); *see also Commissioner Kennedy Letter* (roundly refuting the conclusions drawn by the California PUC staff from the state *Triennial Review* proceeding).

[278] MCI at 49, 59; *compare Triennial Review Order* ¶ 491.

[279] *See* SBC at 44 n.136 (collecting decisions).

extensive hot cut performance data that SBC provided in Attachment B to its comments. Even Z-Tel now acknowledges that it "feel[s] comfortable" with a UNE-L strategy because of the "progress being made on hot cut economics and performance over the past year."[280]

To the extent that CLECs are still raising issues about SBC's batch process, they rely on unsupported allegations, not documented fact. For instance, CompTel/ASCENT simply declares, without providing any supporting data or documentation, that "the evidence gathered in the nine-month state proceedings confirms" that hot-cut procedures prevent CLECs from competing.[281] PACE likewise relies on the bald assertion, supported by no evidence of any kind, that "there are not sufficient and workable procedures in place to transition customers."[282] And MCI states, without support, that "no incumbent has implemented a workable [batch hot-cut] process."[283]

In fact, as SBC demonstrated at length in its comments, it has developed an upgraded batch hot-cut process through a collaborative that it voluntarily undertook with CLECs.[284] That process addresses all the key concerns that CLECs have raised. Among other things, SBC's new offering provides one process by which CLECs can submit unlimited numbers of hot-cut requests without any change to existing provisioning intervals; provides another process by which CLECs can order up to 200 hot cuts per day per central office, including up to 100 hot cuts per day per central office for any individual CLEC; includes OSS enhancements that permit

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[280] Z-Tel Technologies, Inc. Form 8-K at 5-6 (SEC filed July 27, 2004).

[281] CompTel/ASCENT at 44.

[282] PACE at 78.

[283] MCI at 48.

[284] *See* SBC at 58.